

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

_____)	
UNITED STATES OF AMERICA,)	
)	
vs.)	5:18-CR-452-1-F
)	
LEONID ISAAKOVICH TEYF,)	
)	
Defendant.)	
_____)	

AUGUST 23, 2019
HEARING ON MOTION TO COMPEL
BEFORE THE HONORABLE ROBERT T. NUMBERS
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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1 (Friday, August 23, 2019, commencing at 10:10 a.m.)

2 (Call to Order of the Court.)

3 THE COURT: Good morning, everyone.

4 MS. KOCHER: Good morning, Your Honor.

5 MR. WOLF: Good morning, Your Honor.

6 MR. ALLEN: Good morning, Your Honor.

7 THE COURT: We are here in the United States District
8 Court for the Eastern District of North Carolina, sitting in
9 Raleigh for preliminary criminal proceedings. I'm going to
10 begin by asking our Clerk to please place the interpreter under
11 oath.

12 ONE INTERPRETER: Just a second. Let us make sure
13 that it's working.

14 (Pause in proceedings.)

15 (Two interpreters were sworn by the Clerk.)

16 THE COURT: We are here in the case of *United States*
17 *of America versus Leonid Isaakovich Teyf*, case number 5:18-CR-
18 452-1 for a hearing on the Government's motion to compel
19 production. I'll ask attorneys to identify themselves,
20 beginning with counsel for the Government.

21 MS. KOCHER: Thank you, Your Honor. Barbara Kocher,
22 Assistant United States Attorney here on behalf of the
23 Government.

24 MR. ALLEN: Good morning, Your Honor. Hill Allen,
25 Tharrington Smith here in Raleigh.

1 MR. WOLF: Good morning, Your Honor. Robert Wolf,
2 Moses & Singer for Mr. Teyf.

3 THE COURT: All right. Good morning, everyone.

4 I want to hear from both sides, and I'm generally
5 going to let the Government proceed first; it's their motion.
6 But I want to address one issue with the defense to begin with.

7 One of the issues at play here is the defense's
8 ability to review the documents at issue and provide responsive
9 documents, setting aside for the brief moment the Fifth
10 Amendment concerns that have been raised.

11 In reviewing the response that you-all filed, I'm
12 taking it that whether I give you seven days to respond or
13 seven months to respond, you're not actually going to respond
14 until the Fourth Circuit or perhaps the Supreme Court has had
15 the opportunity to resolve the Fifth Amendment question. Is
16 that a accurate assessment of your position?

17 MR. WOLF: Your Honor, it's not now, but if the Court
18 didn't raise it, we were going to. We assert that position
19 now, not knowing how these proceedings will go forward. Our
20 objective is and still is to have the review of what's being
21 produced or, you know, in process of being produced and then be
22 in a position to articulate our position, which may not be --
23 which may very well be different than what it is today.

24 So I'm glad the Court raised it because it's
25 something that we recognized as, you know, as -- as lawyers to

1 be conservative and take the approach as we're both new in the
2 case. There's an enormous amount of discovery, and I can just
3 say this from the outset. I saw Ms. Kocher's response. We're
4 not in any way accusing the Government of being sloppy or -- or
5 slow or anything but, since we've been in the case,
6 cooperative.

7 And, in fact, the position the Government has taken
8 to produce from scratch everything in the case so that there's
9 no issues of whether we got a full file or didn't. Both --
10 respectfully, I think it is protective of both the Government,
11 the Defendant, and the process to ensure that there's complete
12 discovery in what is voluminous.

13 And I joke respectfully again, when they use the word
14 terabytes, I -- if I didn't know the context, I would think it
15 was from a Jurassic Park movie, but I know it's enormous and
16 the Government's in the process of doing it, and it's certainly
17 not our position here that they're taking too long or they're
18 not being cooperative. To the exact contrary.

19 That said, getting back to your question, yes, we
20 would -- we want to review it and then be in a much better
21 position and an informed position to both articulate a position
22 on the motion, discuss it with our client, having reviewed the
23 benefit of all those documents, of one position or what's
24 responsive at that point as well.

25 So I hope that helped.

1 THE COURT: To some extent it does. The difficult
2 position I find myself in is that if I grant the Government's
3 motion to compel, part of my order needs to say, "Produce the
4 responsive documents in X days" or "X months," and part of the
5 reason I wanted you-all to confer before the conference was to
6 try to get a feel for what that X should be filled in by.

7 Because what I want to avoid is going around and
8 around where I say "respond in seven days" that the Government
9 wants, and then you go to Judge Flanagan or the Fourth Circuit
10 and say, "Well, look at this unreasonable magistrate judge here
11 making us respond in seven days."

12 And I don't have a feel for what the appropriate time
13 frame is for you-all to conduct the review. And the takeaway I
14 had -- and we've talked about it a little bit, but the takeaway
15 I had from your response was that an order issued either by
16 myself or Judge Flanagan is not the final stop to this
17 question, and I'm trying to figure out how to deal with that
18 because I want this to move forward in a timely manner.

19 And if the Fifth Amendment issues need to be resolved
20 by the Fourth Circuit or the Supreme Court to get you to that
21 point quickly so that that can be resolved one way or the other
22 and if production is ultimately required, to do that in a
23 timely manner. So that's what I'm struggling with here and --

24 MR. WOLF: Might I suggest --

25 THE COURT: -- trying to get --

1 MR. WOLF: Might I suggest this? And, you know, I
2 don't know how long it would take, but, you know, we're
3 certainly -- would be diligent. Once we have access to it,
4 there's some orderly way that this can be done, even on a
5 rolling basis, so to speak, so at least there's meaningful
6 review of what's an enormous amount of production.

7 And I'm not going to comment. Your Honor's certainly
8 very familiar with the papers. Your order, frankly, I think
9 reflects what was in the Moore & Van Allen response about the
10 millions and everything else. And I appreciate that, and we do
11 think it's very relevant without any critique, of course.

12 But we do need and, respectfully, as defense counsel
13 and -- and pretty new at this, but it's daunting, but we have a
14 responsibility to our client. We have a responsibility to the
15 Court. And respectfully, I think our request would be to allow
16 that time, you know, to have a, you know, meaningful review as
17 expeditiously as we can and then take a position, you know,
18 with regard to, you know, the motion, because it may very well,
19 you know, be a different position. You know, I don't know
20 what's in those documents but, frankly, I think it's, you know,
21 very conceivable that it would -- you know, it would be
22 relevant to the response.

23 And, you know, and response -- when I say that --
24 and, again, I don't want to speculate too much. Response
25 meaning responsive, since we're talking about a subpoena. So,

1 I mean, that I think would be, at least from our side, you
2 know, a responsible way to approach it without just having to
3 take a defensive extreme position while, you know -- you know,
4 right now we don't have this and we're new and we just have to
5 say we're going to, you know, just be overly protective when
6 that position may not, you know, be our position after a
7 review.

8 THE COURT: Thank you, Mr. Wolf.

9 MR. WOLF: Thank you.

10 THE COURT: Ms. Kocher, what do you have to say on
11 this particular aspect of this motion?

12 MS. KOCHER: On this particular aspect, Your Honor, I
13 would note that your original order which denied the motion to
14 quash pointed out that the subpoena seeks records within
15 Mr. Teyf's possession, custody, or control, and that that
16 definition may not very well encompass the multitude of
17 documents that the Government has turned over in discovery.

18 I have informed counsel on a previous occasion and
19 say to the Court that the Government does not believe
20 responsive documents are within all of those. There are a few
21 bank statements as noted in the Defendant's plan -- proposed
22 plan. The fourth superseding indictment does make reference to
23 Alpha Bank, and there was one or two pages from Alpha Bank
24 within all the materials seized that the Government could find.

25 But by and large, the required records are not in the

1 materials seized by the Government. The presumption on the
2 Government, and it is a presumption, is that they're in Russia,
3 and the Government does not have the ability to get those in
4 any other means but through the subpoena to the Defendant.
5 Under the Required-Records Doctrine, of course, and the
6 regulation issue, he's required to keep those records for five
7 years. We're not asking for records be reproduce -- although
8 it would be helpful if they are in the discovery, but we're not
9 asking for the records within discovery to be reproduced to us.

10 THE COURT: I'm sorry, the translator needs you to --

11 MS. KOCHER: I'm sorry.

12 THE COURT: -- stop for a moment.

13 (Pause.)

14 THE COURT: Let me just focus you on what -- and
15 maybe you're going to get there, but let me focus you on what
16 I'm really concerned about.

17 If I want to grant your motion to compel, again, I've
18 got to say Mr. Teyf or his attorneys need to produce the
19 records in X days. And what I'm hearing is that defense
20 counsel is relatively new in this case; it's about two months
21 now or maybe even less than that since they've been in the
22 case.

23 What I've heard is that they don't know what's in
24 there and they can't agree or disagree with your position that
25 the records aren't in there and they can't figure out,

1 apparently, whether they need to go to Russia or some other
2 place to find the records. So how do you see the order being
3 written in terms of the deadline for production, or how do we
4 handle production if you would win on all the other aspects of
5 this case?

6 MS. KOCHER: If it -- if the Defendant -- what I
7 understood the Defendant's position today to be is that they
8 are so unfamiliar with the case, that they are not willing to
9 step forward or decline the position as to the Fifth Amendment
10 privilege. Because what I would ask is that that be addressed
11 first.

12 It would seem to me that that's a legal position; it
13 has nothing to do with the discovery in the case or -- or
14 anything else, and that they would be able to, on very short
15 order, be able to say whether they intend to pursue that. That
16 would be the end of the current order if they intend to proceed
17 on the Fifth Amendment privilege because then it will need to
18 go up to the Fourth Circuit and potentially up for a writ to
19 the Supreme Court.

20 If they conclude in that very short fashion that they
21 do need to get through the discovery or, you know, that they
22 will release that legal argument perhaps, then a production
23 time line -- and I'm in the same dark spot that Your Honor is.
24 I don't know how long -- I do think the answer needs to come
25 from them in that regard. We're certainly more than willing to

1 agree to a reasonable time frame; but like you, there's none
2 been given.

3 THE COURT: Mr. Wolf, in your estimation, you know,
4 how long will it take you to get familiar with these records?

5 MR. WOLF: May I have one second, Your Honor?

6 Your Honor, first of all, we don't have them yet, so
7 the question is when we'll get them from the Government. But
8 after we get them --

9 MR. ALLEN: And, Your Honor, I understand what we're
10 talking about is digital discovery and a forensic image, which
11 will not be searchable when we receive it. It may require us
12 to engage a corresponding expert to render it into some format
13 that then can be dealt with by translators. Presumably the
14 records may well be not in English, so we've got to deal with
15 that issue. So it will require factoring those things in.

16 And I understand you need a time line from us, so
17 what we had tried to propose was 30 days after --

18 THE COURT: That's what I was just going to say.

19 MR. ALLEN: -- we receive the digital discovery, to
20 try to deal with some of those issues.

21 MR. WOLF: And, Your Honor, having now gotten
22 educated procedurally, you know, of what's been sent
23 previously, we're out front already. I'm not going to wait
24 till we get it and then start looking for experts. We'll be
25 ready, you know, upon receipt to start being able to search it

1 as best as we can. And that's why I was going to suggest 30
2 days as well. I think it's a good-faith period. Of course,
3 we'd like more, but I'd respect that there's -- this needs to
4 move. And that might be, you know, more than sufficient to get
5 it, at least the sense for purposes of this motion because
6 we're dealing with a defined issue versus just, you know --

7 THE COURT: So --

8 MR. WOLF: -- preparing. So that's what -- that, I
9 think, 30 days from when we get it would be --

10 THE COURT: So actually what I'm hearing from you is
11 that you're not even certain if you're going to continue to
12 maintain this Fifth Amendment argument until you've reviewed
13 the records. Is that correct?

14 MR. ALLEN: Your Honor, we're not prepared to make an
15 affirmative representation to the Court without having seen the
16 records. We wanted to make sure we weren't over-promising in
17 our proposed plan.

18 To try to give you some sense of how we're coming at
19 it, we want to be protective appropriately as a Fifth Amendment
20 concern, but we do have concerns on that front, but we also --
21 it makes great sense to see if it can be resolved and rendered
22 moot in some other way by looking at the records.

23 MR. WOLF: Yeah. And, Your Honor, if I could just
24 add to that. Needless to say, if there are records that are
25 provided by the Government which, in our view, you know, would

1 provide a basis to be a response, in some respects it's kind of
2 moot because the Government has those records. So they
3 wouldn't -- those -- the whole Fifth Amendment concern, at
4 least, doesn't really strike me as popping out in there, and
5 that's why I think it's a very, you know, productive way to do
6 things in an orderly way because it may eliminate the issues
7 altogether, frankly.

8 If it's in there, the Government already has it, even
9 if it's not something that's readily apparent. It doesn't
10 strike me as any Fifth Amendment privilege at the production
11 privilege. It's something that's already in the Government's
12 possession anyway.

13 THE COURT: So you would be proposing 30 days from
14 the date you receive the materials from the Government to do
15 what exactly, to complete the review, or to assess the time
16 line for the review?

17 MR. WOLF: We would try to complete it, Your Honor,
18 at least for purposes of this motion. And if there's any issue
19 that comes up right away, we can promptly inform the Court, but
20 that would be our goal to do that.

21 MS. KOCHER: Your Honor, that -- for any records that
22 might be on the digital evidence, the Government has no issue
23 or objection to that particular time line. I would, however,
24 request an affirmative statement at an earlier point that there
25 are no other records in existence.

1 This still begs the question as to whether Mr. Teyf
2 has other records in his possession, custody, or control. And
3 to those, a simple conversation with the client would disclose
4 whether or not those records exist, where they are, and they
5 should know today whether they're in Russia and whether they
6 need an elongated period of time to retrieve them or to go see
7 them. That's not been offered.

8 So, again, no objection to the 30 days for what's in
9 the Government's possession, but this still begs the question
10 as to what is not there.

11 THE COURT: Would the defense be persisting in its
12 Fifth Amendment argument regarding documents that are not in
13 the Government's possession?

14 MR. WOLF: Well, Your Honor, we're not in a position
15 right now to determine. For one, the subpoena asks for and I
16 think this Court has already said, whatever is in his custody
17 and control; and if it's not in his control, then -- you know,
18 then it's not -- there's no obligation to respond to it.

19 We're not there yet in terms of our involvement and
20 investigation and learning information as to what exists or
21 doesn't exist. And if it does exist, in what form. It's just
22 at this point we're not prepared to take a position on that,
23 you know, responsibly. I say that responsibly to you.

24 You just can't -- you can't say, "Oh, no problem,"
25 and then as defense lawyers we're acting professionally and

1 responsible. So until we get there -- and we're doing a lot in
2 a very short period of time here, but it needs to get done.
3 And, you know, we need time actually to -- you know, to fully
4 assert that position as well. We've inherited the motions and
5 the positions that have been taken, and we're not giving them
6 up. But we're prepared to go forward at this point, you know,
7 and try to make use of, you know, the next process to see
8 whether that might, you know, obviate the need for certain
9 objections to continue to proceed or not.

10 I mean, there's the Fifth Amendment, there's the
11 Sixth Amendment right which, you know, relates to the ability
12 to review. That's -- Your Honor, in our view, that's totally
13 separate from just going through this exercise responsibly to
14 just review it. I'm not attaching any constitutional
15 dimensions to it. It's just something that needs to get done
16 to, you know, respond to the subpoena, you know, accordingly.
17 So -- *(no further response)*.

18 THE COURT: I guess my other overarching concern in
19 this case is that Mr. Teyf has his Speedy Trial right -- Act
20 and just a general concern about the amount of time this has
21 taken. I know it's a very complex case with a lot of documents.
22 I know that Mr. Wolf and Mr. Allen, you are new to this case.
23 I don't want this case to drag on unnecessarily long, but
24 obviously I need to give you the time to prepare a defense for
25 Mr. Teyf. So that's another concern I have.

1 What I'm hearing is, I think, that there's a need for
2 some additional time to do some additional work, and it may be
3 beneficial to reconvene on some or all of this in about a
4 month's time to see where things stand. So what I'm hearing a
5 lot from the defense is that you have not had the opportunity
6 to get familiar enough with the records to adequately respond
7 to some of these issues.

8 So I think that that may be part of what we do. I
9 don't know if that's going to be the sum total of it, but we
10 may reconvene in a month to figure things out. I know that
11 delays the grand jury's work, but this is a unique case that
12 has some unique aspects to it in terms of the volume of
13 documents that are at issue.

14 I want to shift a little bit to the argument that was
15 raised in the defense's supplemental response of abuse of the
16 grand jury process and whether this motion -- I'm sorry,
17 whether this subpoena is now moot.

18 Ms. Kocher, you didn't have an opportunity to respond
19 to that in writing, so I'll be glad to hear from you now.

20 MS. KOCHER: Your Honor, in short, if that argument
21 has legs, then the recipients of grand jury subpoenas simply
22 have to delay in order to avoid responding to the subpoena. At
23 the time the subpoena was sent, none of the triggering events
24 that are described -- that is, the third and the fourth
25 superseding indictments had been issued.

1 Moreover, the grand jury subpoena is in regard to
2 records that are not fully accounted for in the current
3 charges, so the subject of the grand jury investigation is
4 clearly known to the Defendants. There is a reasonable
5 possibility that those records will, in fact, turn something up
6 for the grand jury's consideration. And, again, I think that
7 it's just a false premise that because timely response wasn't
8 made that they now don't have to respond. So it certainly is
9 not true that the current charges encompass all potential
10 criminal charges.

11 THE COURT: What other potential charges do you think
12 are there?

13 MR. KOCHER: Well, I would -- first of all, there are
14 charges for the failure to maintain the records as required.
15 In addition, in looking at the tax charges, and I'm looking at
16 the indictment on my computer. But the tax charges, Count 50,
17 and so these are the particular ones for failing to file that
18 report of foreign bank and financial accounts are alleged --
19 I'm sorry, they're lengthy paragraphs.

20 So beginning in paragraph 48, Mr. Teyf is charged
21 with failure to file that for 2015. And in Count 49, he is
22 charged with failure to file the 2016. I would note, Your
23 Honor, that there are other years yet that would be potentially
24 reviewed by the grand jury.

25 THE COURT: You mentioned a moment ago failure to

1 maintain records could be an offense as well. So you're saying
2 the failure to maintain could be additional charges beyond
3 what's in 48 and 49 for failing to file?

4 MR. KOCHER: I believe that to be true, Your Honor.
5 So, yes.

6 THE COURT: Does the defense wish to respond at all
7 in the abuse of process matter?

8 MR. WOLF: Yes, Your Honor. Your Honor, I -- under
9 the *Moss* case and the applicable cases, and Your Honor knows
10 the standard is -- and, frankly, it's uniform, you know, in the
11 Supreme Court as well, you know, that universal rules and
12 prosecutors can't utilize the grand jury solely or even
13 primarily for the purpose of gathering evidence in pending
14 litigation. The Fourth Circuit applies what they call the sole
15 or dominant purpose test.

16 But, Your Honor, I see the current situation with a
17 different characterization than Ms. Kocher, here. When the
18 subpoena was issued, there weren't the pending charges of
19 failure to identify foreign bank accounts and the resulting tax
20 fraud charges for -- that go with those. There's now an
21 additional seven counts in the indictment.

22 But I think when Your Honor used the word moot, that
23 was my view. I think the landscape has now changed. You know,
24 this is now the fifth indictment in this case, and now the
25 subpoena addresses, you know, or seeks information that's

1 directly relevant to charged conduct. And it's the -- you
2 know, it gets back to like the -- you know, once a target -- an
3 individual has been indicted, the Government must cease using
4 the grand jury in preparation for trial or, you know, more
5 focused on the sole or dominant purpose test.

6 But Your Honor has read our supplement, and you see
7 from indictments -- superseding two and superseding three,
8 there's no additional defendants, there's no additional
9 charges. It's just a tightening up of the forfeiture
10 allegations. And then from three to four, now we have
11 additional charges, but they're the very charges now that the
12 subpoena addresses. I dare to say when it was first looked at,
13 these charges weren't there, but it directly relates to the
14 purpose of the subpoena.

15 And, Your Honor, respectfully, under the *Moss* case
16 and other cases, I believe there's an obligation of the Court
17 or, you know, to inquire. I think in the *Fisk* [phonetic] case,
18 which is a First Circuit case, the Court required a sworn
19 affidavit from the Government and, in fact, indicated had it
20 not been challenged by a witness that they didn't believe had
21 much standing, they would have asked for more than a sworn
22 affidavit from the Government as to the purpose of the subpoena
23 and what was going on in the grand jury.

24 I think in this case it is -- you know, with the
25 Defendant challenging it, it goes right to the very charges

1 that are contained in this indictment. We're now at indictment
2 number five. I respectfully think the Court should review the
3 grand jury transcripts and make a determination whether the
4 sole or dominant purpose of this subpoena, you know, in
5 comparison demonstrates the sole or dominant purpose, as to
6 whether it's an abuse of the grand jury or not, or rendered
7 moot.

8 THE COURT: Now, you claim that the Government is
9 trying to use the grand jury to obtain discovery for these
10 Counts 48 and 49. 48 and 49 charge your client with failing to
11 report certain -- file certain reports with the IRS about
12 foreign bank accounts. The subpoenas seek documents that he's
13 supposed to maintain about those accounts. And what I've heard
14 from Ms. Kocher is there's a potential for additional charges
15 based upon the failure to maintain those records separate from
16 the failure to file the reports.

17 And I've got the statutes here in front of me. They
18 do allow the secretary to require maintenance of records and
19 filing of records, and the failure to do so in both cases can
20 be a criminal offense, so her argument is not -- doesn't seem
21 to be frivolous, so why is there -- why is this not just the
22 grand jury continuing to investigate potential criminal conduct
23 by your client and not discovery in preparation of trial?

24 MR. WOLF: Well, Your Honor, for one, if the -- if
25 there were documents that were responsive from Alpha Bank, that

1 would be subpoenaing documents from the client to help the
2 Government prove Counts 48 and 49 -- or 47, 48, and 49, to
3 demonstrate with more evidence than they now have. I don't
4 know what evidence they have. We're not --

5 You know, as the Court's recognized, we're kind of
6 the defense lawyer disadvantage. We're shooting in the dark on
7 these abuse of grand jury motions, but that would be a perfect
8 example of how the subpoena is then being used to, you know,
9 gather evidence against existing charges; to make those charges
10 stronger, in fact, and that's exactly what would -- it would
11 encompass. So I'd just use that as an example.

12 But the Government always presents the position to
13 the Court. I don't know if there's one case where the
14 Government comes forward and says, "Yes," you know, "We're
15 really doing this for," you know, "trial preparation to gather
16 evidence on existing charges." The Government always takes the
17 position that it's investigation and, you know, the right to
18 add defendants or add charges. But the Courts have
19 nevertheless determined that, you know, the Court still will
20 make an inquiry of whether to accept that representation.

21 I think in the *Simels* case -- it's one of the cases
22 we cited -- the Second Circuit ultimately rejected the
23 Government's position, having reviewed further the record of
24 what was presented or, in fact, what wasn't presented, you
25 know, to the grand jury and saw, you know, I guess in their

1 view, that the subpoena, you know -- and to use their words,
2 had a sole or dominant purpose for, you know, something that's
3 not permissible or that would be an abuse.

4 Respectfully here, I would -- we would request that
5 the Government should have to provide the transcripts of the
6 grand -- so the Court can make its independent determination as
7 the Courts do as to, you know, whether, you know, the
8 subpoena's being used for the sole and dominant purpose of, you
9 know, acquiring more evidence or, you know, against existing
10 charges or helping the Government prepare for trial against the
11 Defendant. I think it's even more focused now.

12 That's really where I was going to start. The
13 landscape has changed. This indictment now does have these
14 charges. I think it would have been difficult for me to stand
15 here back in February with an indictment that said nothing
16 about foreign bank accounts or anything else. And it is to do
17 today.

18 Plus, you know, of course as Your Honor recognizes,
19 they're much further along as well. I mean, there comes a
20 point in time where a court will say, "Enough of the
21 superseding indictments. There's -- you know, the case needs
22 to move forward and the Defendant has to prepare and know what
23 the charges are and prepare against those, and it just
24 constantly can't be a continuum of superseding indictments."

25 And I believe that's, you know -- it's a fairly --

1 five indictments is not an insignificant number of indictments
2 in a case, but I think we're in that area where the Court
3 inquiries is more than appropriate.

4 THE COURT: Thank you. Ms. Kocher, any rebuttal?

5 MS. KOCHER: First, Your Honor, *Simels* is the only
6 case that I found that the Court actually quashed the subpoena.
7 And in that case, the Government had issued a trial subpoena
8 first under Rule 17, and it was withdrawn or -- at any rate, it
9 no longer was relevant. After that, they issued an identical
10 grand jury subpoena.

11 So the evidence that the Second Circuit was
12 considering there was literally on the record that the sole and
13 dominant purpose was for preparation for trial. No other case
14 that I find concluded that, and certainly not in this case.
15 The purpose presupposes at the time of issuance. The effect is
16 not what the Court's to consider, and the sole and dominant
17 purpose was clearly not for discovery.

18 I would remind the Court that the Government's
19 evidence at the time of the original indictment was that the
20 Defendant and his family was getting ready to leave the
21 country, which caused a more quick process in the beginning,
22 thus the need to continue the investigation on beyond the time
23 of indictment. The -- there are additional charges here.

24 I am also not aware of any case where the Court
25 actually reviewed the transcripts of the grand jury. Now, in

1 other respects, I've seen it in whether there's any *Brady*
2 material or those types of reviews.

3 But in this context, the presumption of the
4 reasonableness of the issuance of the subpoena is very, very
5 strong. And but for Courts requesting in cases that it's not
6 apparent to the Defendant, for the Government to inform the
7 Defendant of the general topic under investigation, there has
8 not been cases requiring the Government to put forth evidence
9 in regard to that grand jury investigation, and certainly not
10 to turn over transcripts to the Court. And that's said with
11 all due respect to the Court, of course. I don't mean that --
12 anything disrespectful to any extent.

13 But in this case, again, I come back to none of this
14 what we're here about today is the Government's doing. The
15 Government issued this subpoena in February. The Government
16 allowed an extension when asked by original counsel, and then
17 through legal process and through a significant period of time
18 where the Defendant was not represented by counsel, we got to
19 where we are today.

20 I do have to say that I do find it kind of ironic
21 that -- the statement that we're well down the path and, you
22 know, we've got five indictments and at some point we have to
23 cut this off, when the beginning of the hearing was all about
24 we're brand-new and we're just starting. And, again, I say
25 that with all respect as well. But it's not as if the case has

1 progressed down the path. We're at the beginning with these
2 counsel and with their reviewing discovery, so I think that
3 that should bear little weight, if any at all, to the Court.

4 But what -- the subpoena is valid as issued. The --
5 there was no evidence that the sole or dominant purpose was
6 preparing for trial. There are other charges validly being
7 investigated by the grand jury and reasonably to investigate,
8 and the possibility that these records will provide information
9 from their review is clear from the record, Your Honor.

10 And I am greatly concerned, as I said earlier, that
11 the lesson to be learned from this Defendant, recipient of the
12 subpoena and all others, is if we delay long enough then the
13 landscape changes and things become moot, and that that can't
14 be the answer that justice would require, Your Honor.

15 THE COURT: All right. Thank you, Counsel.

16 Ms. Kocher, any other points you wish to make today
17 based upon what's been filed before the Court?

18 MS. KOCHER: Your Honor, the only other concern the
19 Government had was just if those filings -- the plans that had
20 been submitted to your office, if those be a public record, I
21 am concerned about the way that the statements about the
22 Government's discovery could be interpreted by others outside
23 of the case, so before I go further, will those be a part of
24 the record?

25 THE COURT: I had not planned to put those on the

1 record unless one or both parties wished to have them on the
2 record. They were more for my own consideration in formulating
3 a production time line.

4 MS. KOCHER: All right. I appreciate counsel opening
5 this morning by making it clear that they did not intend to --
6 'cause we're -- we're actually very excited with the discovery
7 we've done. It's been a good production. It's been very
8 organized, and I thank Sarah Foster, our intelligence
9 specialist, for having done such a great job on that.

10 THE COURT: And I'll definite -- I'll hear from the
11 defense before we wrap up, but to bring things full circle, the
12 proposal is 30 days to review things once everything's been
13 produced.

14 From the Government's standpoint, when can that
15 production be completed?

16 MS. KOCHER: So the hard drive was provided by -- a
17 blank hard drive was provided by the Defendant to us, I think
18 perhaps maybe as much as two weeks ago. We have digital
19 evidence housed both in the Raleigh FBI and the Charlotte FBI.
20 I had hoped to have it to them by now, so I will go back to the
21 FBI as soon as I'm free today and request a specific time line.
22 My expectation would be no further out than the end of next
23 week, then five additional business days.

24 THE COURT: All right, thank you.

25 MS. KOCHER: And, Your Honor, actually, if I may, if

1 you would -- if you consider writing an order with time lines
2 in it, if you would put that in the order, that might be
3 helpful to give us a deadline on that. It helps.

4 THE COURT: What would the -- given that you know the
5 universe of discovery a lot better than I do in this case, what
6 is it that you would like me to tell you to do?

7 MR. KOCHER: That the --

8 (Laughter.)

9 MR. KOCHER: That the Government produce the
10 outstanding digital evidence.

11 THE COURT: Does that sound sufficient to the
12 defense, the outstanding digital evidence is what should be
13 produced by next Friday?

14 MR. WOLF: Yes, Your Honor.

15 THE COURT: And then you-all anticipate approximately
16 30 days to review that and be able to make a determination as
17 to whether there are responsive documents in there?

18 MR. WOLF: Yes, Your Honor. And if for some reason,
19 you know, we feel the need to inform the Court to do it
20 quickly, that I think will -- maybe that was a little too
21 ambitious, but that's certainly going to be the goal.

22 THE COURT: Well, likely due as well as set, you
23 know, whatever the end of September, end of October time frame
24 for us to reconvene to discuss that issue. And I also expect
25 by that time you-all have had the conversations with your

1 client to determine whether you're going to persist in the
2 arguments that have been raised regarding records that may not
3 be in the Government's possession.

4 I don't know and you may not know, no one else may
5 know whether those records exist at all, and that may impact
6 your -- the position you take. But I'll expect whenever we
7 reconvene in late September or early October to be able to
8 really assess what the scope of the issues I have to decide on
9 'cause I --

10 And Mr. Wolf and Mr. Hill, you're -- Mr. Allen,
11 you're here, you know, as relative newcomers, but this case has
12 been going on for a while. Your client is detained, which I'm
13 sure is not his preferred place to be, and so the sooner this
14 case moves forward and gets to whatever its ultimate conclusion
15 is, the better for him, for sure, so he can have certainty and
16 these things can be resolved. So it's my expectation that
17 we'll -- you know, we'll likely reconvene, and then I'll decide
18 those issues promptly after that.

19 Any serious heartburn from either side about that
20 proposal?

21 MR. WOLF: No, Your Honor.

22 MS. KOCHER: No, Your Honor.

23 THE COURT: All right. And anything the defense
24 wishes to add on anything that's been filed or anything we've
25 talked about today?

1 MR. WOLF: Nothing else, Your Honor. Thank you.

2 THE COURT: All right. Thank you very much, Counsel.

3 I will enter an order in the vein we've talked about
4 here regarding production and review of the records and
5 reconvening in a few weeks. Obviously, if circumstances
6 warrant changing that, let me know and we'll address it.

7 And, again, I do -- my expectation, this case will
8 start moving forward now that we've got counsel here, and we'll
9 be able to resolve this aspect of the case in a relatively
10 short period of time.

11 All right. Thank you very much, Counsel. I'll
12 remand the Defendant to the custody of the Marshals, and we'll
13 be in recess.

14 MR. ALLEN: Thank you, Your Honor.

15 (Proceedings ends at 10:44 a.m.)

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17 (END OF TRANSCRIPT.)

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NORTH CAROLINA

CHATHAM COUNTY

CERTIFICATION OF REPORTER

I, Wanda B. Constantino, CVR-CM-M, contract court reporter for the United States District Court for the Eastern District of North Carolina, do hereby certify that pursuant to Section 753, Title 28, United States Code, that the forgoing is a true and correct transcript of the proceedings held in the above-entitled matter;

That the proceedings were reported by me using the voice-writing (Stenomask) method; and

That the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Dated this 9th day of September, 2019.

/s/ WANDA B. CONSTANTINO
Wanda B. Constantino, CVR-CM-M
Contract Court Reporter